

NO. 39554-1-II  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

---

LARRY ANDREWS and MARTHA ANDREWS, husband and wife,  
a marital community,

Appellants,

vs.

HARRISON MEDICAL CENTER, a Washington Non-Profit  
Corporation,

Respondent.

---

**BRIEF OF APPELLANTS**

---

09/10/16 AM 9:42  
STATE OF WASHINGTON  
DEPUTY  
*[Signature]*

COURT OF APPEALS  
DIVISION II

WIGGINS & MASTERS, P.L.L.C.  
Kenneth W. Masters, WSBA 22278  
241 Madison Ave. North  
Bainbridge Island, WA 98110  
(206) 780-5033

Attorney for Appellants

*pm 11-13-09*

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... 1

INTRODUCTION..... 1

ASSIGNMENTS OF ERROR ..... 2

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 2

STATEMENT OF THE CASE..... 2

A. Larry and Martha Andrews lived and worked together for several years, yet HMC never enforced its nepotism policy to prevent them from working together in the OR. .... 3

B. Other people who lived together or were married also worked together in the OR, yet HMC never enforced its nepotism policy to prevent them from working together in the OR even when one spouse supervised the other. .... 3

C. When Larry and Martha married, HMC forbade them to work together solely because they were married. .... 6

D. Many unanswered questions in HMC’s 1993/2001 nepotism policies were answered in its new 2007 policy – adopted after the Andrews were separated..... 6

E. HMC gave “three” reasons why it applied its nepotism policy only to married couples, and not to couples living in a meretricious relationship..... 9

ARGUMENT..... 11

A. The standard of review is *de novo*. .... 11

B. Washington and other States’ laws forbid marital-status discrimination like HMC routinely practices. .... 11

C. Genuine issues of material fact regarding pretext preclude summary judgment here. .... 18

D. If the Court does not reverse on the preceding grounds, this Court should consider the following

	constitutional challenges to the WHRC’s regulation for the first time on appeal under RAP 2.5(a)(3). .....	26
E.	The WHRC’s regulation directly and substantially interferes with the Andrews’ fundamental interest in being free from marital-status discrimination, yet it is neither precisely tailored to meet a compelling state interest, nor even reasonable, but falls well outside the WHRC’s authority.....	27
F.	<i>A fortiori</i> , WHRC’s and HMC’s regulations facially discriminate on the basis of marriage, so the <i>McDonnell Douglas</i> burden-shifting rules do not apply and HMC must establish a BFOQ, which it cannot do.....	32
G.	In the alternative, WHRC’s and HMC’s regulations are not rationally related to a legitimate state purpose.....	35
	CONCLUSION .....	36

**TABLE OF AUTHORITIES**

	Page(s)
<b>U.S. SUPREME COURT CASES</b>	
<b><i>Fuller v. Architect of the Capitol</i>,</b> 2002 U.S. Dist. LEXIS 7285 (D.D.C. 2002).....	18
<b><i>Hazen Paper Co. v. Biggins</i>,</b> 507 U.S. 604, 610, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993).....	18
<b><i>Int'l Bhd. of Teamsters v. United States</i>,</b> 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977).....	18
<b><i>Int'l Union, United Auto., etc. v. Johnson Controls</i>,</b> 499 U.S. 187, 197, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991).....	33, 34
<b><i>Loving v. Virginia</i>,</b> 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).....	27
<b><i>McDonnell Douglas Corp. v. Green</i>,</b> 411 U.S. 792, 801, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).....	passim
<b><i>Raytheon Co. v. Hernandez</i>,</b> 540 U.S. 44, 52, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003).....	18
<b><i>Skinner v. Oklahoma</i>,</b> 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 2d 1655 (1942).....	27
<b><i>St. Mary's Honor Ctr. v. Hicks</i>,</b> 509 U.S. 502, 510-11, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).....	22

<b><i>Texas Dep't of Cmty. Affairs v. Burdine,</i></b> 450 U.S. 248, 254-55 & n.7, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1982).....	20
--	----

<b><i>Wards Cove Packing Co. v. Atonio,</i></b> 490 U.S. 642, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989).....	15
--	----

<b><i>Zablocki v. Redhail,</i></b> 434 U.S. 374, 384, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978).....	28
---	----

**FEDERAL CASES**

<b><i>Bangerter v. Orem City Corp.,</i></b> 46 F.3d 1491, 1500 (10th Cir. 1995) .....	32, 33
--	--------

<b><i>Children's Alliance v. Bellevue,</i></b> 950 F. Supp. 1491, 1495 (Wash. 1997) .....	33
--	----

<b><i>Comty. House, Inc. v. Boise,</i></b> 490 F.3d 1041, 1048 (9th Cir. 2007) .....	32, 33, 34
---	------------

<b><i>Frank v. United Airlines, Inc.,</i></b> 216 F.3d 845, 854 (9th Cir. 2000) .....	32
--	----

<b><i>Loeb v. Textron, Inc.,</i></b> 600 F.2d 1003, 1012 (1st Cir. 1979) .....	15
---	----

<b><i>Parsons v. County of Del Norte,</i></b> 728 F.2d 1234 (9th Cir. 1983), <i>cert denied</i> , 469 U.S. 846 (1984).....	16
--	----

<b><i>Reidt v. County of Trempealeau,</i></b> 975 F.2d 1336, 1341 (7th Cir. 1992) .....	33
--	----

<b><i>U.S. EEOC v. Catholic Healthcare West,</i></b> 530 F. Supp. 1096, 1101 (C.D. Cal. 2008).....	34
---	----

**WASHINGTON STATE COURT CASES**

<b><i>Connell v. Francisco,</i></b> 127 Wn.2d 339, 898 P.2d 831 (1995) .....	24
---	----

<b><i>Edwards v. Farmers Ins. Co.,</i></b> 111 Wn.2d 710, 763 P.2d 1226 (1988) .....	13, 14
<b><i>Fahn v. Cowlitz County,</i></b> 93 Wn.2d 368, 610 P.2d 857, 621 P.2d 1293 (1980).....	31
<b><i>Failor's Pharmacy v. Department of Soc. &amp; Health Servs.,</i></b> 125 Wn.2d 488, 493, 886 P.2d 147 (1994) .....	3
<b><i>Franklin County Sheriff's Office v. Sellers,</i></b> 97 Wn.2d 317, 326, 646 P.2d 113 (1982) .....	35
<b><i>Fusato v. WIAA,</i></b> 93 Wn. App. 762, 767, 970 P.2d 774 (1999).....	27
<b><i>Hegwine v. Longview Fibre Co., Inc.,</i></b> 162 Wn.2d 340, 172 P.3d 688, 696 (2007) .....	passim
<b><i>Hill v. BCTI Income Fund-I,</i></b> 144 Wn.2d 172, 181, 23 P.3d 440 (2001) .....	19, 20, 22
<b><i>In re Custody of Smith,</i></b> 137 Wn.2d 1, 15, 969 P.2d 21 (1998) .....	28
<b><i>In re Welfare of Sumey,</i></b> 94 Wn.2d 757, 762, 621 P.2d 108 (1980) .....	28
<b><i>Isla Verde Int'l Holdings, Inc. v. City of Camas,</i></b> 146 Wn.2d 740, 752, 49 P.3d 867 (2002) .....	26
<b><i>Kastanis v. EECU,</i></b> 122 Wn.2d 483, 859 P.2d 26, 865 P.2d 507 (1993).....	14, 15, 19
<b><i>Mackay v. Acorn Custom Cabinetry, Inc.,</i></b> 127 Wn.2d 302, 310, 898 P.2d 284 (1995) .....	19
<b><i>Magula v. Benton Franklin Title Co.,</i></b> 131 Wn.2d 171, 930 P.2d 307 (1997) .....	15, 19
<b><i>O'Hartigan v. Department of Personnel,</i></b> 118 Wn.2d 111, 117, 821 P.2d 44 (1991) .....	28

<b><i>State Farm Gen. Ins. Co. v. Emerson,</i></b> 102 Wn.2d 477, 687 P.2d 1139 (1984) .....	12, 13, 14
<b><i>State v. McFarland,</i></b> 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) .....	26
<b><i>State v. WWJ Corp.,</i></b> 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) .....	26, 27
<b><i>Waggoner v. Ace Hardware Corp.,</i></b> 134 Wn.2d 748, 751, 953 P.2d 88 (1998) .....	2, 15
<b><i>Wash. Water Power Co. v. Wash. St. Human Rights Comm.,</i></b> 91 Wn.2d 62, 586 P.2d 1149 (1978) (“ <i>WWPC</i> ”).....	passim
<b><i>Washam v. Sonntag,</i></b> 74 Wn. App. 504, 507, 874 P.2d 188 (1994).....	27
<b>OTHER STATE CASES</b>	
<b><i>Kraft, Inc. v. State,</i></b> 284 N.W.2d 386 (Minn. 1979) .....	14
<b><i>Ross v. Stouffer Hotel Co. (Hawaii),</i></b> 816 P.2d 302, 304 (Haw. 1991) .....	17
<b><i>Thompson v. Board of Trustees, Sch. Dist. 12,</i></b> . . . 627 P.2d 1229 (1981) .....	14
<b><i>Vortex Fishing Sys., Inc. v. Foss,</i></b> 38 P.3d 836 (Mont. 2001) .....	16, 17
<b>STATUTES AND REGULATIONS</b>	
RCW 5.60.060(1) .....	24
RCW 28A.600.000 .....	11
RCW 49.60.010.....	30, 31, 32
RCW 49.60.020.....	30

RCW 49.60.030.....	11
RCW 49.60.040.....	14
RCW 49.60.110.....	31
RCW 49.60.120(3) .....	31
RCW 49.60.180.....	11, 16
RCW 49.60.180(1) .....	13
RCW 49.60.180(3) .....	20
RCW 49.60.190.....	11
RCW 49.60.200.....	11
RCW 49.60.222.....	11
WAC 162-16-150.....	12
WAC 162-16-240.....	21, 34, 35
WAC 162-16-250.....	21, 28, 29, 35

**RULES**

RAP 2.5(a)(3) .....	2, 26
---------------------	-------

**OTHER AUTHORITIES**

Lee R. Russ, <i>What Constitutes Employment Discrimination on Basis of "Marital Status" For Purposes of State Civil Rights Laws</i> , 44 A.L.R.4th 1044 (2009).....	16
Annot., 44 A.L.R.4th §§ 3, 6(a).....	14

## INTRODUCTION

Beginning in 2001, Appellants Martha and Larry Andrews worked together in the Operating Room (OR) at Harrison Medical Center (HMC), she as a nurse, he as a technician. Starting in 2004, they lived together in a marriage-like relationship. They continued to work together until August 2006, when they married. When they planned to wed, HMC told them that they could no longer work together once married. After the wedding, HMC refused to schedule them to work together because they were married.

Despite this direct evidence of discrimination on the basis of marital status, HMC sought summary under the ***McDonnell Douglas*** (cited *infra*) burden-shifting scheme, designed for cases involving only circumstantial evidence of discrimination. The Andrews brought forward ample evidence that HMC's reliance on its nepotism policy and a Washington Human Rights Commission (WHRC) WAC permitting marital-status discrimination was pretextual. The Honorable Theodore Spearman nonetheless granted summary judgment to HMC.

Genuine issues of material fact precluded summary judgment here. If not, the WHRC's WAC (and HMC's policy) are facially unconstitutional. Either way, this Court should reverse.

## **ASSIGNMENTS OF ERROR**

1. The trial court erred in granting summary judgment.
2. The trial court erred in entering its Order Granting Summary Judgment on June 26, 2009. CP 143-44.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether plaintiffs proffered sufficient evidence that defendant's excuses for admitted marital-status discrimination were pretextual, raising genuine issues of material fact?
2. If not, then under RAP 2.5(a)(3), should this Court consider the following constitutional issues raised for the first time on appeal (*i.e.*, are these manifest errors affecting a constitutional right)?
3. Does a WHRC regulation that facially discriminates on the basis of marital status violate the Constitution and exceed the WHRC's authority?
4. Is there a compelling or even legitimate state purpose in permitting discrimination on the basis of marital status?

## **STATEMENT OF THE CASE**

The *de novo* standard of review applies to summary judgments. See, *e.g.*, ***Waggoner v. Ace Hardware Corp.***, 134 Wn.2d 748, 751, 953 P.2d 88 (1998). This standard "requires the court to consider facts and reasonable inferences in a light most

favorable to the nonmoving” parties, the Andrews. *Id.* Legal questions are reviewed *de novo*. *Id.* (citing ***Failor's Pharmacy v. Department of Soc. & Health Servs.***, 125 Wn.2d 488, 493, 886 P.2d 147 (1994)). In accordance with these standards, the facts are set forth in the light most favorable to the Andrews.

**A. Larry and Martha Andrews lived and worked together for several years, yet HMC never enforced its nepotism policy to prevent them from working together in the OR.**

Larry worked as an OR Technician for HMC since 1992. CP 86. Martha worked as an OR Nurse for HMC since 2001. *Id.* Martha had nominal supervisory authority over Larry. CP 45, 96.

Larry and Martha began living together in August 2004. CP 10. From then until their marriage on August 8, 2006, they often worked together in the OR. CP 86. HMC “admits that prior to being informed that [the Andrews] were legally married, [they] were permitted to work together in the same operating room.” CP 15.

**B. Other people who lived together or were married also worked together in the OR, yet HMC never enforced its nepotism policy to prevent them from working together in the OR even when one spouse supervised the other.**

HMC also “admits that [other] unmarried couples are permitted to work in the same operating room.” CP 86. In addition to Larry and Martha prior to their marriage, Tom Sanders (OR

nurse and RN) and Jenn Barnett (OR Technician) have lived together since 2001 or 2002, and they are allowed to work together in the same operating room. CP 106-07. As with Martha and Larry, Tom has supervisory authority over Jenn. CP 45, 96, 106.

Even married couples, one of whom supervises the other, are permitted to work together. CP 127. For instance, Amy Leake is a surgical technician who works directly with her husband, anesthesiologist Dr. Jeff Leake. *Id.*; CP 104-05. Dr. Leake has supervisory authority over Amy in the OR. *Id.* Similarly, Dr. Paul and Ms. Becky Hrissikopolous are a married couple allowed to work together in the OR. CP 108. There are numerous other examples. See CP 111-25.

The Andrews presented this as evidence that HMC's reliance on its nepotism policy to separate them was pretextual. CP 105-06, 124. HMC's explanation is that one spouse is a doctor on the medical staff who has no supervisory authority over the other spouse. CP 127. By contrast, the Andrews asserted that medical staff do have supervisory authority over hospital employees in the operating room. CP 104, 108-10.

For example, Dr. Leake – as “Medical Director” – penned a May 10, 2007 memo to the OR Staff regarding “Efficiency in the

OR,” noting the physicians’ responsibility to provide supervision, plainly evidencing his supervisory authority in the OR (CP 129-30):

Areas of Responsibility – Physicians:

1. The physician must assume a leadership role in leading and assisting the OR team in performing their duties;
2. What this means - Leadership and Professionalism;
  - a. Expectation that the physician expresses dissatisfaction in a professional and constructive manner;
  - b. Expressing complaints in a succinct manner, i.e., identifies specific deficiencies;
  - c. Avoiding global condemnations and comparisons;
  - d. No yelling, bloviating, belittling, humiliating or catastrophising;
  - e. Identifying potential team weaknesses and assisting in overcoming them;
  - f. Proactive assistance in identifying equipment requirements and anticipated procedure variance;
  - g. Availability for help in positioning, prep and set-up of cases and preemptive correction of errors.

Dr. Leake went on to delineate both the staff’s and the administration’s respective responsibilities. *Id.* He also noted that any performance evaluation of the staff “necessarily involves direct assessment of skills by the surgeons.” CP 130. There is no reason for Dr. Leake to send such a memo to OR Staff if he has no supervisory authority over them.

**C. When Larry and Martha married, HMC forbade them to work together solely because they were married.**

It is undisputed that HMC nonetheless enforced its nepotism policy against Larry and Martha after they married. See, e.g., CP 15. Among other things, since their marriage they have been forced to be on opposite call times on the same day. CP 45, 60.

**D. Many unanswered questions in HMC's 1993/2001 nepotism policies were answered in its new 2007 policy – adopted after the Andrews were separated.**

As relevant here, HMC's nepotism policy was originally adopted in 1993, and revised in 2001. CP 47-48.<sup>1</sup> It was designed “to avoid potential liability, and/or potential conflict of interest within departments as well as between departments, which might otherwise occur as the result of the employment of relatives.” CP 47, 49. Under the policy,

Employment is not offered, nor will promotions and transfers be granted, to relatives where placement in the vacant position would permit one relative to:

- a. Directly supervise or control the work of the other and/or
- b. Evaluate/audit the work performance of the other and/or
- c. Make or recommend salary decisions affecting the other and/or
- d. Take disciplinary action affecting the other.

---

<sup>1</sup> HMC technically “revised” its 1993 policy in 2003, but the substance did not change. CP 49-50.

*Id.* “A related person is defined as one who has one of the following relationships to an employee by birth, marriage, or common domicile” (CP 47-48):

- a. Spouse
- b. Aunt or Uncle
- c. Child/Stepchild
- d. Niece or Nephew
- e. Father or Mother
- f. Stepparent
- g. Brother or Sister; Stepbrother/Stepsister
- h. Grandparents
- a. [*sic*] Others to be considered on an individual basis.

In April 2007 – after the Andrews were married and forbidden to work together – HMC substantially revised its nepotism policy. CP 51-52. The purpose was no longer “to avoid potential liability,” but supposedly to “avoid potential conflict of interest employment situations by the hiring or assignment of immediate family members.”<sup>2</sup> CP 51. HMC now defined “*Immediate Family Members*” to include all of those listed above, for either spouse, except for stepchild, aunt/uncle, niece/nephew and stepbrother/stepsister, but added “grandchild.” *Id.* Under its 2007 policy, HMC “may refuse to hire or assign an immediate family

---

<sup>2</sup> Yes, that is what it says.

member under any of the following conditions” (CP 51-52, emphasis added):

1. One family member would have the authority or practical power to supervise, appoint, remove or discipline another family member;
2. One family member would be responsible for auditing the work of another family member;
3. Other circumstances exist which would place **the spouses** in a situation of actual or reasonably foreseeable conflict between the interest of [HMC] and their own; or
4. Where in order to avoid the reality or appearance of improper influence of favor [*sic*] or to protect its confidentiality, [HMC] must limit the employment of close relatives of policy level officers of customers, competitors, regulatory agencies, or others with whom the employer deals.

Also new in the 2007 policy is a requirement that employees inform HMC upon “entering into a relationship that may create an immediate family member status in conflict with the tenets of this policy.” CP 52. Moreover, “[s]ituations where employees become related through marriage will be reviewed and handled on a case by case basis.” *Id.* And also new is an express statement that this 2007 policy “does not cover [HMC] Medical Staff, who are not employees and have no management authority or auditing responsibility of any kind regarding [HMC] employees.” *Id.* Nonetheless, “if an employee has any questions or concerns

regarding a member of the Medical staff, the employee is to report them directly to” HMC officers so that “any potential conflicts or appearance of favoritism can be avoided at all times.” *Id.*

HMC again revised its nepotism policy in December 2008, well after this lawsuit was filed. CP 70. This revision added “domestic partners” to the list of *Immediate Family Members* in the 2007 policy. *Id.* It made no other changes. CP 70-71.

**E. HMC gave “three” reasons why it applied its nepotism policy only to married couples, and not to couples living in a meretricious relationship.**

In discovery, the Andrews asked HMC to state the factual bases on which it determined that unmarried couples who were living together and working in the same workstation, where one of the parties had (or potentially had) supervisory authority over the other, did not pose the same potential for conflict as identically situated married couples. CP 100. While HMC gave its answer in three numbered paragraphs, it really gave five reasons (CP 101):

HMC “has no efficient way to collect this data [about who lives with whom] for all employees”;

“in contrast to marital status, dating relationships can and frequently do change, without notice, and there is no legal requirement that employees disclose who [*sic*] they are dating or living with”;

“Employees seeking to keep secret their relationship and living arrangements can do so, which again exposes defendant to unequal treatment of employees”;

“Non-married couples do not have a legal interest in their partner’s earnings. This reduces the risk that one partner might make decisions based on her/his financial interests”;

“Married couples can refuse to testify against one another in legal proceedings. This could impact HMC’S ability to defend a malpractice action.”

Patty Cochrell, HMC Executive VP and Chief Operating Officer (formerly Chief Nursing Officer, VP Operations) admitted that HMC had not “really looked at” whether HMC could simply ask employees to disclose when they were living together. CP 93-94. “[J]ust due to the data collection and keeping it updated and the reporting requirements, [HMC] just decided not to do that.” CP 94.

Kim Raney, HMC Director of Surgical Services, gave Cochrell two reasons for separating Larry and Martha: (1) Larry and Martha could not testify against one another in a malpractice action; and (2) one spouse should not supervise the other due to possible favoritism. CP 97. Cochrell thought it was equally bad for non-married couples to be in this position. *Id.* And she conceded that the only real difference between married and unmarried couples was the marital privilege issue. CP 97-98.

## ARGUMENT

### A. The standard of review is *de novo*.

As explained *supra*, the standard of review is *de novo*.

### B. Washington and other States' laws forbid marital-status discrimination like HMC routinely practices.

As the facts stated above demonstrate, it is undisputed that HMC discriminated against the Andrews in the terms and conditions of their employment on the basis of their marital status. Yet the WLAD recognizes the "right to obtain and hold employment without discrimination" in Washington. RCW 49.60.030. It also identifies an employer's discrimination on the basis of marital status as an "unfair practice" (RCW 49.60.180):<sup>3</sup>

It is an unfair practice for any employer:

(1) To refuse to hire any person because of . . . marital status . . . unless based on a bona fide occupational qualification.

. . .

(2) To discharge any person from employment because of . . . marital status . . .

(3) To discriminate against any person in . . . terms or conditions of employment because of . . . marital status . . .

..

---

<sup>3</sup> Many other Washington statutes also forbid marital-status discrimination. See, e.g., RCW 49.60.222 (real estate transactions); RCW 49.60.200 (employment agency); RCW 49.60.190 (labor unions); RCW 28A.600.000 (interschool athletics).

The seminal Washington case in this area is ***Wash. Water Power Co. v. Wash. St. Human Rights Comm.***, 91 Wn.2d 62, 586 P.2d 1149 (1978) (“***WWPC***”). There, the WHRC had adopted regulations regarding marital-status discrimination. ***WWPC***, 91 Wn.2d at 64-65 & n.2 (quoting former WAC 162-16-150). The company argued that the WHRC had no authority to apply its regulations to marital-status discrimination based on the identity of one’s spouse. 91 Wn.2d at 66. The Court rejected this assertion because the Legislature properly delegated its authority to the WHMC. *Id.* at 67-68.

Since ***WWPC***, our Supreme Court has addressed marital-status discrimination several times. In 1984, for instance, our Supreme Court held that certain family-exclusion clauses in homeowners-insurance policies do not discriminate on the basis of marital status, in ***State Farm Gen. Ins. Co. v. Emerson***, 102 Wn.2d 477, 687 P.2d 1139 (1984). There, the policy excluded recovery for bodily injury to any “insured,” including family members, and specifically spouses. ***Emerson***, 102 Wn.2d at 479 n.1. The Supreme Court held this not a marital-status exclusion, but a family-member exclusion. *Id.* at 480-81.

In 1988, our Supreme Court addressed whether an “other insurance” provision in a UIM policy violated the prohibition against marital-status discrimination, in *Edwards v. Farmers Ins. Co.*, 111 Wn.2d 710, 763 P.2d 1226 (1988). The insurer acknowledged that its “anti-stacking” “other insurance” provision could discriminate against married persons who lived together, but argued that it did not constitute marital-status discrimination because it could apply to others, as in *Emerson. Edwards*, 111 Wn.2d at 717-19. The Court explained that mixed motive situations must be treated with great care in Washington, using nepotism policies as an example:

[D]ifficulties arise when classifications are based in part on marital status and in part on other factors. One example of this type of mixed classification arises in the context of “anti-nepotism” policies, under which an employer refuses to hire, or discharges, a person because his or her spouse is already an employee. The classification in such policies is not simply one of marriage, but one of marriage *and* the spouse’s employment. Some courts in other states have refused to apply their anti-discrimination statutes to these policies, choosing instead to restrict the reach of their statutes to the “pure” marriage distinction, that is, whether an individual has a spouse. . . .

This court, however, has held that an anti-discrimination statute applies more broadly, so as to reach the mixed classifications present in anti-nepotism policies. In [*WWPC, supra*], the Human Rights Commission had determined that employers’ anti-nepotism policies constituted unfair discrimination on the basis of marital status under RCW 49.60.180(1) (making it an unfair practice for an employer to refuse to hire any person because of marital status). In upholding the Commission’s interpretation of RCW

49.60.180(1), we stated that the statute was intended to prohibit this type of classification, not just those distinctions that are based solely on marital status. [*WWPC*,] at 69. Other courts also have reached this result. See, e.g., *Kraft, Inc. v. State*, 284 N.W.2d 386 (Minn. 1979); *Thompson v. Board of Trustees, Sch. Dist. 12*, . . . 627 P.2d 1229 (1981); see generally, Annot., 44 A.L.R.4th §§ 3, 6(a).

111 Wn.2d at 718. Distinguishing *Emerson* and analogizing to *WWPC*, the Court found the *Edwards* provision “to turn specifically on marriage,” despite additional policy qualifications. 111 Wn.2d at 719-20. Thus, the “other insurance” clause discriminated as to marital status, and the Court remanded for trial as to whether the insurer could establish a business necessity. *Id.* at 720.

In 1993, the Legislature defined “marital status” as “the legal status of being married, single, separated, divorced or widowed.” RCW 49.60.040. Also in 1993, but before this definition became effective, the Supreme Court addressed the “business necessity” defense in the context of marital-status discrimination, in *Kastanis v. EECU*, 122 Wn.2d 483, 859 P.2d 26, 865 P.2d 507 (1993). A jury had found marital-status discrimination, but the Court reversed because the jury instruction placed the burden of persuasion as to “business necessity” on the employer; the *Kastanis* Court held that the burden of persuasion always rests with the plaintiff. 122 Wn.2d at 492-94 (citing, *inter alia*, *McDonnell Douglas Corp. v. Green*,

411 U.S. 792, 801, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); **Wards Cove Packing Co. v. Atonio**, 490 U.S. 642, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); **Loeb v. Textron, Inc.**, 600 F.2d 1003, 1012 (1st Cir. 1979)). The Court specifically noted, however, that the employee in that case did not challenge the WHRC's regulation. 122 Wn.2d at 492 n.4.

In 1997, our Supreme Court reversed a summary judgment and remanded for trial due to genuine issues of material fact regarding marital-status discrimination, in **Magula v. Benton Franklin Title Co.**, 131 Wn.2d 171, 930 P.2d 307 (1997). There, the wife was terminated based on the conduct of her non-employee husband, who worked as an independent contractor for the wife's employer and allegedly caused trouble in the workplace. The **Magula** decision turns largely on the meaning of "marital status," which is not relevant here: the Andrews were married employees who were both treated in a discriminatory fashion.

In 1998, our Supreme Court held that the prohibition against marital-status discrimination did not apply to dating and cohabiting relationships, in **Waggoner v. Ace Hardware Corp.**, 134 Wn.2d 748, 953 P.2d 88 (1998). The company had a policy against related, cohabiting, or dating employees supervising one another.

134 Wn.2d at 750. It discovered dating and cohabiting by two employees, one of whom supervised the other. *Id.* at 750-51. The company fired both employees, they married four months later, and they sued the company for marital status discrimination. *Id.* at 751. The Supreme Court determined that dating or cohabiting is not being married, so RCW 49.60.180 did apply. *Id.* at 753-54.

In sum, Washington has a long and clear history of forbidding marital-status discrimination. While federal courts addressing discriminatory nepotism policies have routinely failed to strike them down (perhaps because Title VII of the 1964 Civil Rights Act does not forbid marital-status discrimination) state courts have been more vigilant.<sup>4</sup> For instance, the Supreme Court of Montana recently upheld a finding of marital-status discrimination *via* a nepotism policy where, as here, the parties had lived together prior to marriage, in ***Vortex Fishing Sys., Inc. v. Foss***, 38 P.3d 836 (Mont. 2001). When the ***Vortex*** plaintiff announced his intention to marry a co-worker with whom he had been living, he

---

<sup>4</sup> See, e.g., ***Parsons v. County of Del Norte***, 728 F.2d 1234 (9<sup>th</sup> Cir. 1983), *cert denied*, 469 U.S. 846 (1984) (nepotism policy not marital-status discrimination); see generally, Lee R. Russ, *What Constitutes Employment Discrimination on Basis of "Marital Status" For Purposes of State Civil Rights Laws*, 44 A.L.R.4<sup>th</sup> 1044 (2009).

was told that the employer's anti-nepotism policy would mean one or the other of the employees would have to leave the company. A subsequent administrative proceeding determined that the employer had discriminated on the basis of marriage, and the **Vortex** court affirmed: the plaintiff was a member of the protected class (married people), otherwise qualified for employment, who was terminated because of his marriage, and the employer's various excuses failed to present a legitimate, nondiscriminatory basis for the nepotism policy. 38 P.3d at 838-40.

Similarly, the Supreme Court of Hawaii followed our Supreme Court's **WWPC** decision, holding that the laws forbidding marital-status discrimination bar such nepotism policies unless they fall within an express statutory exception:

The employer's invocation of the [nepotism] policy a year after they had entered into a marital relationship left them with a Hobson's choice of one of them either giving up his or her employment, or their seeking a divorce, and continuing to live together and being employed in their chosen occupation. We hold the statute in question prohibits forcing a married couple to make such a choice, absent some statutory exception to the rule.

**Ross v. Stouffer Hotel Co. (Hawaii)**, 816 P.2d 302, 304 (Haw. 1991). The court found that the employer failed to meet any statutory exception, and affirmed the discrimination finding.

**C. Genuine issues of material fact regarding pretext preclude summary judgment here.**

The Andrews' claim of marital-status discrimination *via* disparate treatment was litigated under the three-step burden-shifting process in *McDonnell Douglas, supra*.<sup>5</sup> See generally, e.g., *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 172 P.3d 688, 696 (2007) (pregnancy discrimination). In disparate-treatment discrimination cases, the “employer simply treats some people less favorably than others because of their . . . [ . . . protected characteristic].” 172 P.3d at 696 n.7 (quoting *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52, 124 S. Ct. 513, 157 L.Ed.2d 357 (2003) (alterations in original) (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977))). “Liability in a disparate-treatment case “depends on whether the protected trait . . . actually motivated the employer’s decision.” *Id.* (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993)).

A recent D.C. District Court decision illustrates the analysis used in such a case. *Fuller v. Architect of the Capitol*, 2002 U.S.

---

<sup>5</sup> As further discussed *infra*, this is not the proper analysis; but even if it was the proper analysis, issues of fact preclude summary judgment.

Dist. LEXIS 7285 (D.D.C. 2002) (copy attached). Applying the **McDonnell Douglas** analysis (further discussed below), the court found that (1) plaintiff was a member of the protected class (married people); (2) qualified for the job in question; (3) who suffered an adverse employment action (he was not hired); (4) for discriminatory reasons. Despite the employer's proffered defense of its policy, the District Court found numerous genuine issues of material fact because, like here, the employer applied its policy unequally and based on marriage.

The Andrews must first establish a *prima facie* case of marital-status discrimination. **Hegwine**, 172 P.3d at 696 (citing **Hill v. BCTI Income Fund-I**, 144 Wn.2d 172, 181, 23 P.3d 440 (2001)). As in **Magula**, the "plaintiff must prove '(1) that the employer discriminated against her based on her marital status and (2) that this discrimination was not justified or excused by 'business necessity'.'" 131 Wn.2d at 176 (citing **Kastanis**, 122 Wn.2d at 493). "Marital status must be a substantial factor in the employer's adverse employment decision." *Id.* (citing **MacKay v. Acorn Custom Cabinetry, Inc.**, 127 Wn.2d 302, 310, 898 P.2d 284 (1995)).

But it is uncontested in this case that HMC discriminated against the Andrews regarding the “terms or conditions of [their] employment because of . . . [their] marital status.” RCW 49.60.180(3). Before they (and others) were married, they could work together in the OR, even when they were living together in a marriage-like relationship. When they decided to marry, they were told HMC would apply its nepotism policy against them. After they married, HMC did apply its policy, even though others who were similarly situated continued to work together under similar circumstances. HMC never denied that the Andrews’ marital status was a substantial factor giving rise to their disparate treatment.

As a result, a “‘legally mandatory, rebuttable presumption’ of discrimination temporarily” accrued, shifting the burden “to the defendant to produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action sufficient to ‘raise[] a genuine issue of fact as to whether [the defendant] discriminated against the plaintiff.’” *Hegwine*, 172 P.3d at 696 (citing *Hill*, 144 Wn.2d at 181 (citation omitted) (alterations in original) (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55 & n.7, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1982))). Here, HMC excused its discrimination by citing a WHRC regulation

stating a “narrow exception” to the rule against marital-status discrimination (CP 24-25):

(1) *General rule.* It is an unfair practice to discriminate against an employee . . . because of marital status.

. . .

(2) *Exceptions to the rule.* There are narrow exceptions to the rule that an employer . . . may not discriminate on the basis of marital status:

(a) If a bona fide occupational qualification applies (please see WAC 162-16-240).

(b) If an employer is enforcing a documented conflict of interest policy limiting employment opportunities on the basis of marital status:

- (i) Where one spouse would have the authority or practical power to supervise, appoint, remove or discipline the other;
- (ii) Where one spouse would be responsible for auditing the work of the other;
- (iii) Where other circumstances exist which would place the spouses in a situation of actual or reasonably foreseeable conflict between the employer’s interest and their own;

. . .

WAC 162-16-250. That is, HMC asserted that it could engage in marital-status discrimination with impunity under this WAC.

No court has held that merely citing this regulation is sufficient to raise a genuine issue of material fact and rebut the presumption of marital-status discrimination. As discussed below, there are very serious problems with this regulation. But be that as

it may, simply quoting the WAC does not raise a genuine issue of material fact in this case.

Rather, HMC proffered the five reasons noted above as justifications for its behavior. See *supra*, Facts § E (citing CP 101). Since HMC met its “intermediate production burden, the *presumption* established by having the prima facie evidence is rebutted and ‘. . . simply drops out of the picture.’” *Hegwine*, 172 P.3d at 696 (citing *Hill*, 144 Wn.2d at 182 (quoting *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993))). “Once the presumption is removed,” however, the plaintiff is then “afforded a fair opportunity to show that [defendant’s] stated reason for [the adverse action] was in fact pretext.” 162 Wn.2d at 696 (quoting *Hill*, 144 Wn.2d at 182 (quoting *McDonnell Douglas*, 411 U.S. at 804)).

At issue here, then, is whether the Andrews proffered sufficient circumstantial evidence to raise a genuine issue of material fact on pretext. The following evidence established that HMC’s proffered excuses are merely pretextual.

HMC “has no efficient way to collect this data [about who lives with whom] for all employees”;

CP 101. When asked whether she thought HMC could legally collect this data, HMC Executive VP and Chief Operating Officer Cochrell said “We don’t do it,” but then said, “I don’t know the answer to that question.” CP 92. When asked why HMC could not just ask employees to report when such relationships began and ended, she said, “Well, we haven’t really looked at that as a potential way.” CP 67. There is no substantial reason why HMC could not collect this data. This is a pretext, not an excuse.

“in contrast to marital status, dating relationships can and frequently do change, without notice, and there is no legal requirement that employees disclose who [*sic*] they are dating or living with”;

CP 101. This is the same as above. Marriages “can and frequently do change” too, but that is no excuse for discrimination. Regardless of legal requirements, nothing prevents HMC from gathering information and applying its nepotism policy equally. But as Cochrell put it, HMC “just decided not to do that.” CP 67.

“Employees seeking to keep secret their relationship and living arrangements can do so, which again exposes defendant to unequal treatment of employees”;

CP 101. Not much difference here, either. It is the quintessence of pretext for an employer to argue that institutionalized discrimination may still exist because someone might game the system, so that is a good reason for allowing blatant discrimination.

“Non-married couples do not have a legal interest in their partner’s earnings. This reduces the risk that one partner might make decisions based on her/his financial interests”;

CP 101. This is, of course, simply false. See, e.g., **Connell v. Francisco**, 127 Wn.2d 339, 898 P.2d 831 (1995), or any one of the many “meretricious relationship” cases holding that people living in a marriage-like relationship can and do have an interest in their partner’s earnings. More pretext.

“Married couples can refuse to testify against one another in legal proceedings. This could impact HMC’S ability to defend a malpractice action.”

CP 101. This excuse is difficult to understand. Why (and how) would a married couple employed by HMC assert the marital privilege in a way that would **harm** HMC’s ability to defend a malpractice action? The privilege says that a “spouse or domestic partner shall not be examined **for or against his or her spouse** or domestic partner, without the consent of the spouse or domestic partner.” RCW 5.60.060(1) (emphasis added). More importantly, discriminating on the basis of the marital privilege is no different than discriminating on the basis of marriage. At best, reasonable people could disagree on this highly debatable “excuse.”

In addition to these genuine issues of material fact, a more fundamental indication of pretext exists here: HMC’s own COO

stated that she “[did not] think it’s probably a good idea” for unmarried couples to work together in the OR where one supervises the other. CP 97. This is because the potential “perception of favoritism” is identical, regardless of whether the couple is married or just living together. CP 97-98. Yet HMC simply does not apply its policy to non-married couples, no matter how marriage-like their relationships may be. And “favoritism” may occur in all types of relationships, including between friends, former classmates, and roommates. The answer in all such “conflicts” situations is to deal with the problem if and when it occurs, not to create a blanket discrimination solely against married couples.

On the evidence, a jury could reasonably determine that HMC’s asserted “business necessity” is simply a pretext for marital-status discrimination. HMC’s argument that its failure to apply its policy against married couples in which one spouse is on the medical staff (who, HMC claims, are not employees)<sup>6</sup> just raises additional issues of material fact: HMC may refuse to discriminate against one-half-employee married couples, but that is no excuse

---

<sup>6</sup> *But see, e.g.*, CP 129-30: memo from Dr. Leake, “Medical Director,” to “OR Staff,” in which he is plainly acting in a supervisory role over HMC employees, a paid HMC job. See CP 109. Dr. Leake is one of the “Medical Staff” spouses against whom HMC does not enforce its policy.

to discriminate against married employees. This Court should reverse and remand for trial on the pretext issue.

As explained below, this actually is not the proper analysis. Rather, HMC's policy (and the WHRC's WAC) discriminate on their face, providing direct evidence of discrimination. But if the Court chooses not to reach the issues raised *infra*, then questions of fact precluded summary judgment under the above analysis.

**D. If the Court does not reverse on the preceding grounds, this Court should consider the following constitutional challenges to the WHRC's regulation for the first time on appeal under RAP 2.5(a)(3).**

Assuming *arguendo* that the Court does not reverse for the reasons stated above,<sup>7</sup> then it should consider the constitutional challenges discussed below for the first time on appeal under RAP 2.5(a)(3). Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." See RAP 2.5(a)(3); ***State v. WWJ Corp.***, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) (error must be (a) constitutional and (b) manifest); see also ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (appellant "must identify a constitutional error and

---

<sup>7</sup> The Court should not reach constitutional issues if it can resolve the appeal on other grounds. See, e.g., ***Isla Verde Int'l Holdings, Inc. v. City of Camas***, 146 Wn.2d 740, 752, 49 P.3d 867 (2002).

show how, in the context of the trial, the alleged error actually affected the [appellant]’s rights”). A constitutional error is manifest when it had practical and identifiable consequences below. *WWJ Corp.*, 138 Wn.2d at 603. As further explained *infra*, the trial court committed manifest errors that deprived the Andrews of their rights to be free from marital-status discrimination and to receive a fair trial based on the WLAD and the Constitution.

**E. The WHRC’s regulation directly and substantially interferes with the Andrews’ fundamental interest in being free from marital-status discrimination, yet it is neither precisely tailored to meet a compelling state interest, nor even reasonable, but falls well outside the WHRC’s authority.**

“Constitutional challenges are reviewed de novo.” *Fusato v. WIAA*, 93 Wn. App. 762, 767, 970 P.2d 774 (1999) (citing *Washam v. Sonntag*, 74 Wn. App. 504, 507, 874 P.2d 188 (1994)). The right to marry is fundamental. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 2d 1655 (1942) (marriage among “basic civil rights of man,” fundamental to human existence); *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men” – a liberty interest under

the *Fourteenth Amendment's Due Process* clause); **Zablocki v. Redhail**, 434 U.S. 374, 384, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978) (“the right to marry is of fundamental importance for all individuals”).

Laws that interfere directly and substantially with the fundamental right to marry are subject to strict scrutiny. See, e.g., **Zablocki**, 434 U.S. at 386-87. “When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Id.* at 388; see also, e.g., **In re Custody of Smith**, 137 Wn.2d 1, 15, 969 P.2d 21 (1998) (“Where a fundamental right is involved, state interference is justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved”; citing, *inter alia*, **O’Hartigan v. Department of Personnel**, 118 Wn.2d 111, 117, 821 P.2d 44 (1991); **In re Welfare of Sumey**, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)).

Here, the WHRC’s WAC directly and substantially interferes with this fundamental right. While recognizing the fundamental right (“It is an unfair practice to discriminate against an employee . . . because of marital status”) WAC 162-16-250 nonetheless asserts

that there “are narrow exceptions to the rule that an employer . . . may not discriminate on the basis of marital status.” The WAC purports to authorize marital-status discrimination where “an employer is enforcing a documented conflict of interest policy limiting employment opportunities on the basis of marital status,” when “one spouse would have the authority or practical power to supervise, appoint, remove or discipline the other.” WAC 162-16-250. The WAC goes even further, however, authorizing discrimination where “other circumstances exist” that might give rise to a “reasonably foreseeable conflict” between employer and employee. *Id.*, § (2)(b)(iii). In short, the WAC – on its face – authorizes marital-status discrimination in a very broad (if not unlimited) range of circumstances.

HMC proffered no important state interest served by this WAC. While federal courts have held that employers’ anti-nepotism policies are rationally related to some purpose, no court has held that a WAC like this one, which facially discriminates on the basis of marital status, passes strict scrutiny. No important state interest is served by this WAC.

More importantly, even if some arguably important state interest could be articulated here, the WAC is certainly not narrowly

tailored to meet only that interest. For instance, HMC claimed that its nepotism policy was “necessary” to prevent “favoritism.” While this is not an important state interest – indeed, the State has no interest in ensuring that private employers may discriminate on the basis of marital status – the WAC is not narrowly tailored to meet that interest in any event. Rather, it extends out to the myriad “foreseeable” “conflicts” between employers and employees – an endless “exception” that completely swallows the rule barring marital-status discrimination.

Not only is this WAC unsupported by important state interests and untailored to those interests, but it flies directly in the face of the WHRC’s mandate to ***eliminate and prevent*** discrimination forbidden by our Constitution (RCW 49.60.010):

This chapter . . . is an exercise of the police power . . . in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of . . . marital status . . . are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

The WLAD “shall be construed liberally for the accomplishment of the purposes thereof.” RCW 49.60.020. And the “purposes” of the

WLAD and the WHRC are to **eliminate and prevent** employment discrimination based on marital status (RCW 49.60.010):

A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment . . . because of . . . marital status . . . ; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

The WHRC was thus given the power to “formulate policies to effectuate” those purposes. RCW 49.60.110. It is to “adopt, amend, and rescind **suitable rules to carry out the provisions of this chapter.**” RCW 49.60.120(3) (emphasis added).

Instead, this “narrow exception” purports to **authorize** discrimination. Regulations that fail to pursue express legislative purposes – much less flying in the face of them – are not enforceable. See, e.g., **WWPC**, 91 Wn.2d at 65; **Fahn v. Cowlitz County**, 93 Wn.2d 368, 610 P.2d 857, 621 P.2d 1293 (1980). In **Fahn**, the Supreme Court evaluated a WHRC WAC providing that employee height requirements were unlawful unless the employer could establish that no one under the height requirement could do the job. 93 Wn.2d at 373. Like here, the regulation functioned to prevent one party from putting on relevant evidence (here, pretext evidence). *Id.* at 377-78. On this basis, the Court found the regulation invalid. *Id.* at 382:

Although the law against discrimination lodges broad authority in the Human Rights Commission with respect to the “elimination and prevention of discrimination in employment” (RCW 49.60.010), we do not believe the legislature intended to permit the agency to entirely foreclose an employer’s opportunity to demonstrate the basis for particular practices and requirements.

Here too, the legislative authorization to **eliminate and prevent** discrimination does not permit the WHRC to enact regulations that **create and encourage** marital-status discrimination. As further discussed below, this facially discriminatory regulation is unconstitutional. This Court should strike down this WAC, reverse, and remand for trial on whether HMC’s reliance on this WAC and its equally unconstitutional nepotism policy are pretextual.

F. ***A fortiori*, WHRC’s and HMC’s regulations facially discriminate on the basis of marriage, so the *McDonnell Douglas* burden-shifting rules do not apply and HMC must establish a BFOQ, which it cannot do.**

“A facially discriminatory policy is one which on its face applies less favorably to a protected group.” ***Comty. House, Inc. v. Boise***, 490 F.3d 1041, 1048 (9<sup>th</sup> Cir. 2007) (citing ***Frank v. United Airlines, Inc.***, 216 F.3d 845, 854 (9<sup>th</sup> Cir. 2000); ***Bangerter v. Orem City Corp.***, 46 F.3d 1491, 1500 (10<sup>th</sup> Cir. 1995)). Where, as here, a policy explicitly treats similarly situated parties (such as

couples in married vs. meretricious relationships) differently, it is facially discriminatory. **Cmty. House**, 490 F.3d at 1048 (citing **Int'l Union, United Auto., etc. v. Johnson Controls**, 499 U.S. 187, 197, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991)); **Children's Alliance v. Bellevue**, 950 F. Supp. 1491, 1495 (Wash. 1997) ("Differential treatment on the face of an ordinance demonstrates an intent to discriminate; additional evidence of discriminatory animus is not required" (citing **Bangerter**, 46 F.3d at 1500-01))).<sup>8</sup>

Where a regulation is discriminatory on its face, the **McDonnell Douglas** burden-shifting analysis does not apply. **Cmty. House**, 490 F.3d at 1049-50 (citing **Bangerter**, 46 F.3d at 1501 n.16; **Reidt v. County of Trempealeau**, 975 F.2d 1336, 1341 (7th Cir. 1992) ("The **McDonnell Douglas** procedure is inapt in a situation involving a facially discriminatory policy")). "Instead, the Supreme Court's decision in **Johnson Controls**, 499 U.S. at 200-01, provides the appropriate approach in facial discrimination cases

---

<sup>8</sup> While **Cmty. House** concerned discrimination under the FHA, that court expressly noted its reliance upon employment discrimination case law. 490 F.3d at 1048 n.3 ("In examining discrimination issues under the Fair Housing Act, we frequently draw from employment discrimination analysis" (citations omitted)).

such as this.” 490 F.3d at 1049; accord *U.S. EEOC v. Catholic Healthcare West*, 530 F. Supp. 1096, 1101 (C.D. Cal. 2008).

In *Johnson Controls*, the Supreme Court found facially discriminatory an employer policy barring all fertile women from jobs involving lead exposure. 499 U.S. at 197, 211. The Supreme Court held that an allegedly benign motive was insufficient to save the discriminatory policy (*id.* at 199):

[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.

In these circumstances, the employer could prevail only if it could establish that the protected status was a bona fide occupational qualification, or BFOQ. *Id.* at 200.

In Washington, the BFOQ defense is very narrow. See, e.g., *Hegwine*, *supra*, 172 P.3d at 697-98 (quoting WAC 162-16-240). The cited WAC (and prior Washington precedents) provide that to establish a BFOQ, the employer must show either that excluding members of a protected status group is “essential to . . . the purposes of the job” or that “all or substantially all” members of the protected group “would be unable to perform the duties” of the job

in question. 162 Wn.2d at 698 (citing and quoting WAC 162-16-240, and *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 326, 646 P.2d 113 (1982)). As in most cases of facial discrimination, the employer in *Hegwine* could not meet this heavy burden. 172 P.3d at 699.

The same is true here. Both HMC's nepotism policy and the WHRC's WAC 162-16-250 are facially discriminatory: they expressly discriminate on the basis of marital status. HMC produced no evidence that all married persons are incapable of performing the Andrews' jobs, which is plainly not the case. Both the policy and the WAC should be stricken for facially discriminating on the basis of the Andrews' fundamental right to marriage.

**G. In the alternative, WHRC's and HMC's regulations are not rationally related to a legitimate state purpose.**

As noted above, federal courts have often applied a rational basis test to nepotism policies. But those courts were not addressing the WLAD or the WHRC's facially-discriminatory WAC. This Court should apply the above analyses and strike down these discriminatory practices.

In any event, HMC did not proffer even a rational basis for its discriminatory policy or the WAC. As noted above, they both fly in

the face of the WLAD's purpose to eliminate and prevent discrimination on the basis of marital status. There is no legitimate state interest in discriminating on the basis of marital status in the terms and conditions of employment. This Court should strike down both the WAC and HMC's discriminatory policy.

### CONCLUSION

For the reasons stated above, this Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of November, 2009.

WIGGINS & MASTERS, P.L.L.C.

  
Kenneth W. Masters, WSBA 22278  
241 Madison Avenue North  
Bainbridge Is, WA 98110  
(206) 780-5033

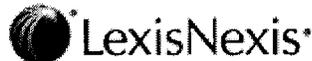
**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANTS** postage prepaid, via U.S. mail on the 13<sup>th</sup> day of November 2009, to the following counsel of record at the following addresses:

Jeffrey Allen James  
Sebris Busto James  
14205 SE 36<sup>th</sup> St Ste 325  
Bellevue, WA 98006-1505

  
Kenneth W. Masters, WSBA 22278

COURT OF APPEALS  
DIVISION II  
03 NOV 16 AM 9:42  
STATE OF WASHINGTON  
BY   
DEPUTY



24 of 250 DOCUMENTS

WENDY LEE FULLER, Plaintiff, v. ARCHITECT OF THE CAPITOL, Defendant.

Civil Action No. 00-197 (GK)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2002 U.S. Dist. LEXIS 7285

April 17, 2002, Decided  
April 18, 2002, Filed

**DISPOSITION:** [\*1] Defendant's Motion for Summary Judgment denied.

2 The facts contained herein are either undisputed or clearly identified as the allegations of one of the parties.

**COUNSEL:** For WENDY LEE FULLER, plaintiff: Charles Boileau Bailey, North Beach, MD.

Plaintiff filed this action for a discriminatory failure to hire and disparate treatment occurring in March and April of 1999. Defendant is the Architect of the Capitol ("AOC"), an organization within the legislative branch of government that is responsible for facilities supervision for Congress, the Supreme Court, and the Library of Congress.

For ARCHITECT OF THE CAPITOL, federal defendant: David Jackson Ball, Jr., U.S. ATTORNEY'S OFFICE, Washington, DC.

**JUDGES:** GLADYS KESSLER, UNITED STATES DISTRICT JUDGE.

**A. AOC's Anti-Nepotism Policy**

**OPINION BY:** GLADYS KESSLER

AOC has had an anti-nepotism policy in place since 1968. Initially, the policy prohibited a relative of a "public official" from being appointed to a position under the supervision of that official. In 1992, AOC substantially revised its policy, prohibiting not only employment of a relative in the same chain of command as a public official, but also the employment of a relative anywhere else within the AOC. The most recent policy, promulgated in 1994, narrows this restriction in that it prohibits [\*3] employment of relatives only within the same "organizational element" where the "public official" works. <sup>3</sup> Defendant maintains that AOC only began enforcing its anti-nepotism policy in 1997, following an investigation by the AOC's Inspector General into allegations of nepotism. See Def.'s Mot. 6-7.

**OPINION**

**MEMORANDUM OPINION**

Plaintiff, Wendy Lee Fuller, brings this employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and the Congressional Accountability Act <sup>1</sup>, 2 U.S.C. § 1301 et seq. This matter comes before the Court upon Defendant's Motion for Summary Judgment [# 31]. Upon consideration of the motion, opposition, reply and the entire record herein, for the reasons stated below, Defendant's Motion is **denied**.

3 Specifically, the current anti-nepotism policy provides that:

1 The Congressional Accountability Act makes certain civil rights and labor laws applicable to the legislative branch of the federal government. The particular provision extending protection under Title VII of the Civil Rights Act of 1964 is 2 U.S.C. § 1311(a)(1).

the relative of a public official may not be appointed, employed, promoted or advanced, or supervised by a subordinate of the public official to whom he or she is

[\*2] I. BACKGROUND <sup>2</sup>

related, or by another public official of this Office in the same organizational element, regardless of the public official's non-involvement in the action affecting the relative.

*Def.'s Mot. Ex. 1 P 2.2.* Although "organizational element" is not defined in the nepotism policy itself, it is applied as referring to the particular organization within the AOC where the "public official" at issue works. It is undisputed that the Construction Management Division, the division of AOC to which Plaintiff applied, is considered a single "organizational element." *See Def.'s Mot. at 3-4; see generally Pl.'s Opp'n.*

#### **[\*4] B. AOC's Failure to Hire Plaintiff**

Plaintiff alleges that she applied for a laborer position in the Construction Management Division (CMD) of AOC in March 1999. Plaintiff was initially selected for the position of laborer by CMD. Plaintiff's application was then forwarded to AOC's Human Resources Management Division ("HRMD") for approval. Her application was ultimately denied because AOC determined that hiring Plaintiff would violate its anti-nepotism policy. Plaintiff's husband, Michael Fuller, was and currently remains an electrician foreman in CMD.<sup>4</sup>

4 AOC treats foremen as falling within the definition of "public official[s]" for purposes of the anti-nepotism policy. *See Declaration of Hector Suarez (Suarez Decl.) P 16 (Attachment A to Def.'s Mot.)*

Around the same time, Carl Bowman, the son-in-law of a foreman with CMD, namely Joe Meredith, also applied for the position of laborer with CMD. At that time, Mr. Bowman and Mr. Meredith's daughter were separated. The AOC did not enforce its anti-nepotism [\*5] policy against Mr. Bowman, and hired him in March of 1999 as a laborer.

Plaintiff alleges that AOC's decision to hire Mr. Bowman instead of her was discriminatory and a consequence of disparate enforcement of its anti-nepotism policy. Plaintiff also alleges numerous other examples in which AOC has failed to enforce its anti-nepotism policy against male laborers before and after she was denied the position she sought.

## **II. STANDARD OF REVIEW**

Summary judgment will be granted when the pleadings, depositions, answers to interrogatories and admis-

sions on file, together with any affidavits or declarations, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The party seeking summary judgment bears the burden of demonstrating an absence of genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In determining whether the movant has met this burden, a court must consider all factual inferences in the light most favorable to the non-moving party. *McKinney v. Dole*, 246 U.S. App. D.C. 376, 765 F.2d 1129, 1135 (D.C. Cir. 1985). [\*6]

## **III. ANALYSIS**

In order to establish a *prima facie* case of disparate treatment for failure to hire under Title VII, a plaintiff must show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 994, 152 L. Ed. 2d 1 (2002) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)).

Once a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the challenged action. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). If an employer can articulate a legitimate nondiscriminatory reason, the burden then shifts back to the plaintiff to present evidence of pretext. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).

Defendant moves for summary judgment on the grounds that there are no triable [\*7] issues of fact, and that it has legitimate, nondiscriminatory reasons for not hiring Plaintiff as a laborer.<sup>5</sup> Specifically, Defendant argues that its anti-nepotism policy prevents AOC from hiring Plaintiff, since her husband is a foreman with CMD.

5 It is undisputed that Plaintiff was qualified for the job but could not be hired because of the anti-nepotism policy.

Plaintiff argues that the anti-nepotism policy has been discriminatorily enforced. Plaintiff contends, for example, that Mr. Bowman, whose father-in-law is a foreman with CMD, was hired as a laborer with CMD at the same time that Plaintiff, who was equally qualified, was not selected. Plaintiff also contends that there are numerous instances in which AOC has refrained from enforcing its anti-nepotism policy against other male

employees before and after Plaintiff was denied the position of laborer in March of 1999.

Upon careful review of the record, the Court finds that there are triable issues of material fact with respect to Plaintiff's claim [\*8] of disparate treatment for AOC's refusal to hire her that preclude summary judgment.

First, there are disputed issues of fact as to whether AOC hired a similarly situated male, Mr. Bowman, instead of Plaintiff, for the position of laborer in violation of its anti-nepotism policy in March of 1999.<sup>6</sup>

6 For example, Defendant contends that Mr. Bowman was separated from his wife at the time AOC hired him in March 1999 and that therefore, AOC acted appropriately in declining to apply the anti-nepotism policy against him. *See* Def.'s Mot. 11-13. Plaintiff argues that there is no exception in the anti-nepotism policy for separated spouses, and that in any event, Mr. Bowman's father-in-law retained supervisory duties at CMD even after Mr. Bowman reconciled with his wife in December of 1999. *See* Pl.'s Opp'n at 4-5.

Second, there are disputed issues of fact with respect to other instances of nepotism tolerated at CMD. Specifically, Plaintiff has presented evidence of a number of cases in which AOC did not apply [\*9] its anti-nepotism policy against male laborers.<sup>7</sup> For example, Plaintiff claims that in March 1998, AOC identified a case of nepotism involving Harold Johnson, a carpenter foreman, and Jerry Johnson, his son, who at the time was an operating engineer at CMD. Plaintiff asserts that although Harold Johnson agreed to step down to a non-supervisory position once this instance of nepotism was identified by AOC, he still maintained many of his supervisory duties, in violation of the anti-nepotism policy. *See* Pl.'s Opp'n at 6.

7 Indeed, Plaintiff alleges that the only cases in which nepotism was tolerated for women involved custodial, rather than laborer positions. Plaintiff points to the case of Ms. Jearlean Joyner and her relatives, who were permitted to remain at CMD as custodial staff, pursuant to a union agreement. *See* Opp'n at 9-10.

Plaintiff also points to the cases of Curtis Eyler and Carl Smith, cousins who have worked as laborers and supervisors at CMD since 1991. Defendant admits that AOC has not [\*10] enforced its policy against them, but contends that they were hired in 1991, prior to the time AOC allegedly began to strictly enforce its anti-nepotism policy in 1997. Defendant also argues that Smith's seniority and on-the-job related injuries which occurred after Plaintiff's application was denied warrant non-

enforcement of the policy. These issues are vigorously disputed by Plaintiff.

Third, there are issues in dispute with respect to the particular terms of the nepotism policy in effect during the time of Plaintiff's non-selection. Specifically, Plaintiff has presented evidence that the stricter 1992 policy, rather than the present 1994 policy, was actually in effect at the time of Plaintiff's non-selection and remained in effect until March 2001. *See* Pl.'s Opp'n at 7-8. The 1992 policy is stricter in that it prohibits the employment of relatives throughout AOC, rather than simply within the same organizational element, as prohibited by the 1994 policy. Plaintiff alleges that there were at least seven additional instances in which nepotism was tolerated for male employees at CMD that Violated the 1992 policy.<sup>8</sup>

8 These cases involve: (1) Roger Crigger and Robert Creger, who are brothers; (2) Ben and Lois Ort, who are married; (3) Mark and Catherine Framton, who are married; (4) Corey and Calvin King, who are brothers; (5) Robert Miley and Jeff Kershner (relationship not specified by the parties); (6) Richard and Jarrod Seiss, who are brothers; and (7) James Shook and Fred Remus (relationship not specified by the parties). Defendant contends that the 1994 policy was in place at the time these cases were identified, and that they do not violate the 1994 policy because the relatives worked in different organizational elements, which the 1994 policy permits. *See* Def.'s Mot. 13 - 14. Plaintiff disputes that the 1994 policy was in place at the time AOC first learned of these cases of nepotism.

[\*11] Finally, there is a dispute concerning when AOC first began enforcing its long-standing policy against nepotism. Defendant contends that it began strictly enforcing its policy in 1997, after an inspection by the AOC's Inspector General. *See* Def.'s Mot. 6-7. Plaintiff disputes this, and contends that AOC began enforcing its policy subsequent to Plaintiff's complaint; Plaintiff submits that prior to that time, AOC repeatedly tolerated cases of nepotism involving male laborers. *See* Pl.'s Opp'n at 3-6.

In light of these material facts in dispute, summary judgment is clearly inappropriate. Defendant's Motion is therefore **denied**<sup>9</sup>

9 Defendant also submits that summary judgment should be granted because Plaintiff failed to timely file her Complaint within the statutory 90-day deadline for bringing this action under the Congressional Accountability Act. This argument was already presented in Defendant's Motion to Dismiss, which was denied in open Court on Sep-

tember 8, 2000. The Court has considered and rejected as meritless Defendant's arguments in favor of revisiting this issue. *See* Def.'s Mot. at 32-39; Reply at 2-5.

**[\*12] IV. CONCLUSION**

For all the forgoing reason, Defendant's Motion for Summary Judgment is **denied**. An appropriate Order accompanies this Opinion.

April 17, 2002

DATE

GLADYS KESSLER

UNITED STATES DISTRICT JUDGE

**ORDER**

Plaintiff, Wendy Lee Fuller, brings this employment discrimination action under Title VII of the Civil Rights

Act of 1964, *42 U.S.C. 2000e et seq.*, and the Congressional Accountability Act, *2 U.S.C. § 1301 et seq.* This matter comes before the Court upon Defendant's Motion for Summary Judgment. Upon consideration of the motion, opposition, reply and the entire record herein, for the reasons stated in the accompanying Memorandum Opinion, it is hereby

**ORDERED**, that Defendant's Motion for Summary Judgment [# 31] is **denied**; it is further

**ORDERED**, that this case is referred to Magistrate Judge Facciola for settlement purposes, to commence immediately. Parties are to report by May 15, 2002 on the progress of settlement discussions.

April 17, 2002

DATE

GLADYS KESSLER

UNITED STATES DISTRICT JUDGE

RCW 5.60.060 Who are disqualified — Privileged communications.

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 70.96A, 70.96B, 71.05, or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

(2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

(b) A parent or guardian of a minor child arrested on a criminal charge may not be examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian. This privilege does not extend to communications made prior to the arrest.

(3) A member of the clergy, a Christian Science practitioner listed in the Christian Science Journal, or a priest shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

(4) Subject to the limitations under RCW 70.96A.140 or 71.05.360 (8) and (9), a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

(b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may

impose pursuant to court rules.

(5) A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure.

(6)(a) A peer support group counselor shall not, without consent of the law enforcement officer or firefighter making the communication, be compelled to testify about any communication made to the counselor by the officer or firefighter while receiving counseling. The counselor must be designated as such by the sheriff, police chief, fire chief, or chief of the Washington state patrol, prior to the incident that results in counseling. The privilege only applies when the communication was made to the counselor while acting in his or her capacity as a peer support group counselor. The privilege does not apply if the counselor was an initial responding officer or firefighter, a witness, or a party to the incident which prompted the delivery of peer support group counseling services to the law enforcement officer or firefighter.

(b) For purposes of this section, "peer support group counselor" means a:

(i) Law enforcement officer, firefighter, civilian employee of a law enforcement agency, or civilian employee of a fire department, who has received training to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity; or

(ii) Nonemployee counselor who has been designated by the sheriff, police chief, fire chief, or chief of the Washington state patrol to provide emotional and moral support and counseling to an officer or firefighter who needs those services as a result of an incident in which the officer or firefighter was involved while acting in his or her official capacity.

(7) A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made between the victim and the sexual assault advocate.

(a) For purposes of this section, "sexual assault advocate" means the employee or volunteer from a rape crisis center, victim assistance unit, program, or association, that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the victim to accompany the victim to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings.

(b) A sexual assault advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Any sexual assault advocate participating in good faith in the disclosing of records and communications

under this section shall have immunity from any liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this section, the good faith of the sexual assault advocate who disclosed the confidential communication shall be presumed.

(8) A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate.

(a) For purposes of this section, "domestic violence advocate" means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of social and health services as defined in RCW 26.44.020.

(b) A domestic violence advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. This section does not relieve a domestic violence advocate from the requirement to report or cause to be reported an incident under RCW 26.44.030(1) or to disclose relevant records relating to a child as required by RCW 26.44.030(12). Any domestic violence advocate participating in good faith in the disclosing of communications under this subsection is immune from liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this subsection, the good faith of the domestic violence advocate who disclosed the confidential communication shall be presumed.

(9) A mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW may not disclose, or be compelled to testify about, any information acquired from persons consulting the individual in a professional capacity when the information was necessary to enable the individual to render professional services to those persons except:

(a) With the written authorization of that person or, in the case of death or disability, the person's personal representative;

(b) If the person waives the privilege by bringing charges against the mental health counselor licensed under chapter 18.225 RCW;

(c) In response to a subpoena from the secretary of health. The secretary may subpoena only records related to a complaint or report under RCW 18.130.050;

(d) As required under chapter 26.44 or 74.34 RCW or RCW 71.05.360 (8) and (9); or

(e) To any individual if the mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter 18.225 RCW reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the individual or any other individual; however, there is no obligation on the part of the provider to so disclose.

[2009 c 424 § 1; 2008 c 6 § 402; 2007 c 472 § 1. Prior: 2006 c 259 § 2; 2006 c 202 § 1; 2006 c 30 § 1; 2005 c 504 § 705; 2001 c 286 § 2; 1998 c 72 § 1; 1997 c 338 § 1; 1996 c 156 § 1; 1995 c 240 § 1; 1989 c 271 § 301; prior: 1989 c 10 § 1; 1987 c 439 § 11; 1987 c 212 § 1501; 1986 c 305 § 101; 1982 c 56 § 1; 1979 ex.s. c 215 § 2; 1965 c 13 § 7; Code 1881 § 392; 1879 p 118 § 1; 1877 p 86 § 394; 1873 p 107 § 385; 1869 p 104 § 387; 1854 p 187 § 294; RRS § 1214. Cf. 1886 p 73 § 1.]

RCW 49.60.010 Purpose of chapter.

This chapter shall be known as the "law against discrimination." It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

[2007 c 187 § 1; 2006 c 4 § 1; 1997 c 271 § 1; 1995 c 259 § 1; 1993 c 510 § 1; 1985 c 185 § 1; 1973 1st ex.s. c 214 § 1; 1973 c 141 § 1; 1969 ex.s. c 167 § 1; 1957 c 37 § 1; 1949 c 183 § 1; Rem. Supp. 1949 § 7614-20.]

RCW 49.60.020 Construction of chapter — Election of other remedies.

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination because of race, color, creed, national origin, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, other than a law which purports to require or permit doing any act which is an unfair practice under this chapter. Nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights. This chapter shall not be construed to endorse any specific belief, practice, behavior, or orientation. Inclusion of sexual orientation in this chapter shall not be construed to modify or supersede state law relating to marriage.

[2007 c 187 § 2; 2006 c 4 § 2; 1993 c 510 § 2; 1973 1st ex.s. c 214 § 2; 1973 c 141 § 2; 1957 c 37 § 2; 1949 c 183 § 12; Rem. Supp. 1949 § 7614-30.]

RCW 49.60.030 Freedom from discrimination — Declaration of civil rights.

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW 48.30.300, 48.44.220, or 48.46.370 does not constitute an unfair practice for the purposes of this subparagraph;

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and

(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together

with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW 49.60.225 contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter 19.86 RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

[2009 c 164 § 1; 2007 c 187 § 3; 2006 c 4 § 3; 1997 c 271 § 2; 1995 c 135 § 3. Prior: 1993 c 510 § 3; 1993 c 69 § 1; 1984 c 32 § 2; 1979 c 127 § 2; 1977 ex.s. c 192 § 1; 1974 ex.s. c 32 § 1; 1973 1st ex.s. c 214 § 3; 1973 c 141 § 3; 1969 ex.s. c 167 § 2; 1957 c 37 § 3; 1949 c 183 § 2; Rem. Supp. 1949 § 7614-21.]

## RCW 49.60.040 Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Aggrieved person" means any person who: (a) Claims to have been injured by an unfair practice in a real estate transaction; or (b) believes that he or she will be injured by an unfair practice in a real estate transaction that is about to occur.

(2) "Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps: PROVIDED, That nothing contained in this definition shall be construed to include or apply to any institute, bona fide club, or place of accommodation, which is by its nature distinctly private, including fraternal organizations, though where public use is permitted that use shall be covered by this chapter; nor shall anything contained in this definition apply to any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution.

(3) "Commission" means the Washington state human rights commission.

(4) "Complainant" means the person who files a complaint in a real estate transaction.

(5) "Covered multifamily dwelling" means: (a) Buildings consisting of four or more dwelling units if such buildings have one or more elevators; and (b) ground floor dwelling units in other buildings consisting of four or more dwelling units.

(6) "Credit transaction" includes any open or closed end credit transaction, whether in the nature of a loan, retail installment transaction, credit card issue or charge, or otherwise, and whether for personal or for business purposes, in which a service,

finance, or interest charge is imposed, or which provides for repayment in scheduled payments, when such credit is extended in the regular course of any trade or commerce, including but not limited to transactions by banks, savings and loan associations or other financial lending institutions of whatever nature, stock brokers, or by a merchant or mercantile establishment which as part of its ordinary business permits or provides that payment for purchases of property or service therefrom may be deferred.

(7)(a) "Disability" means the presence of a sensory, mental, or physical impairment that:

- (i) Is medically cognizable or diagnosable; or
- (ii) Exists as a record or history; or
- (iii) Is perceived to exist whether or not it exists in fact.

(b) A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.

(c) For purposes of this definition, "impairment" includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:

(i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(e) For purposes of (d) of this subsection, a limitation is not substantial if it has only a trivial effect.

(8) "Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons.

(9) "Dwelling" means any building, structure, or portion thereof that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(10) "Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person.

(11) "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.

(12) "Employment agency" includes any person undertaking with or without compensation to recruit, procure, refer, or place employees for an employer.

(13) "Families with children status" means one or more individuals who have not attained the age of eighteen years being domiciled with a parent or another person having legal custody of such individual or individuals, or with the designee of such parent or other person having such legal custody, with the written permission of such parent or other person. Families with children status also applies to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years.

(14) "Full enjoyment of" includes the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement, without acts directly or indirectly causing persons of any particular race, creed, color, sex, sexual orientation, national origin, or with any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, to be treated as not welcome, accepted, desired, or solicited.

(15) "Honorably discharged veteran or military status" means a person who is:

(a) A veteran, as defined in RCW [41.04.007](#); or

(b) An active or reserve member in any branch of the armed forces of the United States, including the national guard, coast guard, and armed forces reserves.

(16) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances or terms or conditions of employment, or for other mutual aid or protection in connection with employment.

(17) "Marital status" means the legal status of being married, single, separated, divorced, or widowed.

(18) "National origin" includes "ancestry."

(19) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees and receivers, or any group of persons; it includes any owner, lessee, proprietor, manager, agent, or employee, whether one or more natural persons; and further includes any political or civil subdivisions of the state and any agency or instrumentality of the state or of any political or civil subdivision thereof.

(20) "Premises" means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building.

(21) "Real estate transaction" includes the sale, appraisal, brokering, exchange, purchase, rental, or lease of real property, transacting or applying for a real estate loan, or the provision of brokerage services.

(22) "Real property" includes buildings, structures, dwellings, real estate, lands, tenements, leaseholds, interests in real estate cooperatives, condominiums, and hereditaments, corporeal and incorporeal, or any interest therein.

(23) "Respondent" means any person accused in a complaint or amended complaint of an unfair practice in a real estate transaction.

(24) "Service animal" means an animal that is trained for the purpose of assisting or accommodating a sensory, mental, or physical disability of a person with a disability.

(25) "Sex" means gender.

(26) "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.

RCW 49.60.110 Commission to formulate policies.

The commission shall formulate policies to effectuate the purposes of this chapter and may make recommendations to agencies and officers of the state or local subdivisions of government in aid of such policies and purposes.

[1985 c 185 § 9; 1949 c 183 § 5; Rem. Supp. 1949 § 7614-24.]

RCW 49.60.120 Certain powers and duties of commission.

The commission shall have the functions, powers, and duties:

(1) To appoint an executive director and chief examiner, and such investigators, examiners, clerks, and other employees and agents as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(2) To obtain upon request and utilize the services of all governmental departments and agencies.

(3) To adopt, amend, and rescind suitable rules to carry out the provisions of this chapter, and the policies and practices of the commission in connection therewith.

(4) To receive, impartially investigate, and pass upon complaints alleging unfair practices as defined in this chapter.

(5) To issue such publications and results of investigations and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of sex, sexual orientation, race, creed, color, national origin, marital status, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability.

(6) To make such technical studies as are appropriate to effectuate the purposes and policies of this chapter and to publish and distribute the reports of such studies.

(7) To cooperate and act jointly or by division of labor with the United States or other states, with other Washington state agencies, commissions, and other government entities, and with political subdivisions of the state of Washington and their respective human rights agencies to carry out the purposes of this chapter. However, the powers which may be exercised by the commission under this subsection permit investigations and complaint dispositions only if the investigations are designed to reveal, or the complaint deals only with, allegations which, if proven, would constitute unfair practices under this chapter. The commission may perform such services for these agencies and be reimbursed therefor.

(8) To foster good relations between minority and majority population groups of the state through seminars, conferences, educational programs, and other intergroup relations activities.

RCW 49.60.180 Unfair practices of employers.

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, unless based upon a bona fide occupational qualification: PROVIDED, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved: PROVIDED, That this section shall not be construed to require an employer to establish employment goals or quotas based on sexual orientation.

(2) To discharge or bar any person from employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability: PROVIDED, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability, or any intent to make any such limitation, specification, or discrimination, unless based upon a bona fide occupational qualification: PROVIDED, Nothing contained herein shall prohibit advertising in a foreign language.

WAC 162-16-240 Bona fide occupational qualification.

Under the law against discrimination, there is an exception to the rule that an employer, employment agency, labor union, or other person may not discriminate on the basis of protected status; that is if a bona fide occupational qualification (BFOQ) applies. The commission believes that the BFOQ exception should be applied narrowly to jobs for which a particular quality of protected status will be essential to or will contribute to the accomplishment of the purposes of the job. The following examples illustrate how the commission applies BFOQs:

(1) Where it is necessary for the purpose of authenticity or genuineness (e.g., model, actor, actress) or maintaining conventional standards of sexual privacy (e.g., locker room attendant, intimate apparel fitter) the commission will consider protected status to be a BFOQ.

(2) A 911 emergency response service needs operators who are bilingual in English and Spanish. The job qualification should be spoken language competency, not national origin.

(3) An employer refuses to consider a person with a disability for a receptionist position on the basis that the person's disability "would make customers and other coworkers uncomfortable." This is **not** a valid BFOQ.

(4) A person with a disability applies for promotion to a position at a different site within the firm. The firm does not promote the person because doing so would compel the firm to install an assistive device on equipment at that site to enable the person to properly perform the job. This is **not** a valid BFOQ.

WAC 162-16-250 Discrimination because of marital status.

(1) **General rule.** It is an unfair practice to discriminate against an employee or job applicant because of marital status. Examples of unfair practices include, but are not limited to:

(a) Refusing to hire a single or divorced applicant because of a presumption that "married persons are more stable."

(b) Refusing to promote a married employee because of a presumption that he or she "will be less willing to work late and travel."

(2) **Exceptions to the rule.** There are narrow exceptions to the rule that an employer, employment agency, labor union, or other person may not discriminate on the basis of marital status:

(a) If a bona fide occupational qualification applies (please see WAC [162-16-240](#)).

(b) If an employer is enforcing a documented conflict of interest policy limiting employment opportunities on the basis of marital status:

(i) Where one spouse would have the authority or practical power to supervise, appoint, remove, or discipline the other;

(ii) Where one spouse would be responsible for auditing the work of the other;

(iii) Where other circumstances exist which would place the spouses in a situation of actual or reasonably foreseeable conflict between the employer's interest and their own;  
or

(iv) Where, in order to avoid the reality or appearance of improper influence or favor, or to protect its confidentiality, the employer must limit the employment of close relatives of policy level officers of customers, competitors, regulatory agencies, or others with whom the employer deals.